

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIVE**

UMWA HEALTH & RETIREMENT FUNDS

Employer¹

and

Case 5-UC-385

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND
EMPLOYEES' UNION

Union/Petitioner

DECISION AND ORDER DISMISSING PETITION

Upon a petition filed under Section 9(b) of the National Labor Relations Act, as amended, careful investigation and consideration took place.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

The Petitioner proposes to clarify the existing bargaining unit to include employees in the newly created classification of "Program Manager, Community Health Nursing." For the reasons explained below, I find clarification of the bargaining unit is not warranted and, accordingly, dismiss the petition.

The Petitioner and the Employer are parties to an existing collective-bargaining agreement expiring on September 30, 2004, and covering a unit of: "All regular employees except for all managerial, supervisory, professional, temporary, and confidential personnel as defined by law." By the instant petition, the Petitioner seeks to clarify the unit to read: "All

¹ The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

regular employees (including the newly-established position of Program Community Health Nursing [sic]) except for all managerial, supervisory, professional, temporary, and confidential personnel as defined by law.” There are approximately 106 employees in the existing unit, mostly clerical employees and technicians who analyze and process medical and pension benefits for coal miners, but also two registered nurses who provide administrative review of applications for disability pensions.² There are three registered nurses in the newly created classification; they implement and manage delivery of health services to beneficiaries, including by assessing beneficiaries’ health status and by coordinating interventions with health care providers and/or the Employer’s medical management vendor.

The Petitioner contends that the job duties of the registered nurses in the Program Manager, Community Health Nursing position are similar to those of some of the bargaining unit employees, and that the registered nurses therefore share a sufficient community of interest with unit employees to warrant their inclusion in the unit through the instant unit clarification procedure. The Petitioner relies on *Upstate Home for Children*, 309 NLRB 986 (1992), to support its contention that professional employees may be added to a unit which includes non-professional employees without a self-determination election, using traditional community of interest criteria. To the contrary, the Employer contends that Section 9(b)(1) of the Act prohibits including professional employees in a unit of non-professionals unless professional employees in a separate election express their preference to be included. *Lockheed Aircraft Corp.*, 155 NLRB 702, 713, fn. 17 (1965). It is undisputed that no such separate election has been held among the Employer’s registered nurses.

² The anomaly of the unit including two registered nurses while specifically excluding professional employees is not explained. Neither party contends these two registered nurses are not professional employees.

I find that Petitioner's reliance on *Upstate Home for Children* is misplaced. In that case, the Board found separate petitioned-for units limited to registered nurses (RNs) and licensed practical nurses (LPNs) to be inappropriate, since other professional and non-professional employees shared a community of interest with the RNs and LPNs respectively. The Board did not hold that if the petitioner desired to represent the RNs, it could do so by including the RNs in the overall unit with nonprofessional employees without a separate election. As the Employer correctly points out, the express language of Section 9(b)(1) of the Act provides that "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." In *Leedom v. Kyne*, 249 F.2d 490 (D.C. Cir. 1957), the District of Columbia Court of Appeals construed the limitation in Section 9(b)(1) as intended to protect professional employees, and held that the professionals' right to this benefit does not depend on Board discretion or expertise, and that the denial of this right must be deemed to result in injury. The United States Supreme Court affirmed this ruling. 358 U.S. 184 (1958).

Registered nurses meet the Board's standards for professional employees and are recognized as professionals by the Board. See, e.g., *Centralia Convalescent Center*, 295 NLRB 42 (1989). In the instant case, the Employer asserts that the RNs at issue "unequivocally" are professional employees, and the Petitioner does not contend to the contrary; I find these RNs to be professionals as defined in Section 2(12) of the Act. Accordingly, the clear directive of Section 9(b)(1) of the Act prohibits adding the three RNs at issue to the existing unit unless the RNs vote in favor of such inclusion, notwithstanding that other RNs seemingly have been included in the contractual bargaining unit by agreement of the parties. See *Sonotone Corp.*, 90

NLRB 1236 (1950); see also *Utah Power & Light Co.*, 258 NLRB 1059 (1981). Inasmuch as such a vote cannot be accomplished through a unit clarification proceeding, I shall dismiss the instant petition.

ORDER

The Petition filed in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by August 13, 2003.

Dated July 30, 2003
At Baltimore, Maryland

WAYNE R. GOLD
Regional Director, Region 5



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